United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

F019

No. 21,059

Henry Patterson, Appellant

v.

United States of America, Appellee

Appeal From a Denial of a Motion in
the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 11 1967

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QUESTION PRESENTED

The question is whether consecutive terms of imprisonment can legally be imposed for the statutory offenses of robbery and manslaughter where both offenses grow out of the same act.

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Appeal from a Denial of a Motion in
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's *pro se* motion for correction of an illegal sentence under Rule 35, *Fed. R. Crim. P.* A margin note on the face of appellant's *pro se* motion indicated why the district court judge denied that motion. Notice of Appeal was filed on 22 May 1967.

Jurisdiction of this Court is based upon 28 U.S.C. § 1291.

STATEMENT OF CASE

Appellant and four other men were charged in a two-count indictment for first degree murder [D.C. Code § 22-2401 (1961)] and robbery [D.C.Code § 22-2901 (1961)]. Count One of the indictment, charging first degree murder, was founded on a "felony-murder" theory. It read in part:

> The Grand Jury charges:
>
> On or about September 10, 1955, within the District of Columbia, Henry Patterson, . . . perpetrated a robbery . . . and in perpetrating that robbery, Henry Patterson, . . . unlawfully and feloniously did murder Maceo C. Leatherwood by means of striking and hitting him with [his] hands and fists thereby causing the said Maceo C. Leatherwood to fall to the pavement and to receive injuries to his head, of which injuries he did die on or about October 11, 1955.
>
> . . . .

During the second day of trial, appellant pleaded guilty to manslaughter [D.C. Code § 22-2405 (1961)] under Count One of the indictment and to robbery [D.C. Code § 22-2901 (1961)] under Count Two of the indictment. On 9 March 1956 appellant was sentenced to consecutive terms of imprisonment of from five to fifteen years for manslaughter and from five to fifteen years for robbery.

On 4 April 1967 appellant filed in the District Court a pro se "Motion to Correct Illegal Sentence Given Pursuant

to Federal Rules of Criminal Procedures: Rule 35" that attacked the legality of his consecutive sentences. This motion was denied on 17 April. The following statement was written in the margin on the face of the motion by the district court judge:

> Denied. The Irby case is not applicable. In this case, there were two separate and distinct crimes. In the Irby case the first crime merged into the second. Moreover, there is a petition for rehearing en banc pending in the Irby case and until it is disposed of the Irby case does not constitute a binding precedent.

This appeal followed.

STATUTES AND RULE INVOLVED

22 D. C. Code § 2401

Murder in the first degree -- Purposeful killing -- Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in the perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

22 D. C. Code § 2405

Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

22 D. C. Code § 2901

Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 35, Federal Rules of Criminal Procedure

Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within

the time provided herein for the reduction of sentence. The court may reduce a sentence within one hundred twenty days after the sentence is imposed, or within one hundred twenty days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred twenty days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT OF THE POINT

1. The District Court erred in denying appellant's motion to correct his illegal sentence because where distinct offenses grow out of the same act, consecutive sentences are illegal unless it is clear that Congress has sanctioned multiple and consecutive punishment.

SUMMARY OF THE ARGUMENT

Appellant contends that he was illegally sentenced by the District Court after pleading guilty to manslaughter and robbery under an indictment charging first degree murder and robbery, when the first degree murder count of the indictment was founded on a "felony-murder" theory.

In cases involving a single episode directed toward one criminal objective, but where distinct offenses are chargeable, this Court has held that consecutive sentences are legal only in situations where it is clear that Congress intended to sanction multiple and consecutive punishment. Ingram v. United States, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965); Davenport v. United States, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965). See Irby v. United States, ___U.S. App. D.C. ___, ___F.2d ___ (No. 19,988, dec. Nov. 17, 1967)(en banc).

Where there is doubt as to whether Congress intended the imposition of consecutive sentences, courts adopt a lenient construction of Congressional enactments in favor of single punishment. See Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed. 2d 370, 59 A.L.R. 2d 940 (1957); Heflin v. United States, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed.2d 407 (1959).

Courts should continue to adopt this lenient construction, especially under circumstances like those in this case, where a "felony-murder" theory was the basis for one count of the two-count indictment. Davenport v. United States, supra; see, Irby v. United States, supra.

ARGUMENT

I. THIS COURT HAS HELD THAT CONSECUTIVE SENTENCES ARE LEGAL ONLY WHERE IT IS CLEAR THAT CONGRESS SANCTIONED MULTIPLE AND CONSECUTIVE PUNISHMENT.

In its recent Irby en banc opinion this Court held that in a case involving a single course of criminal conduct it was not improper to impose consecutive sentences "where two discrete protected interests are involved, and where the course of conduct although continuous in its flow, nevertheless affords an opportunity for discrimination by the actor between such interest before both are infringed."[1/] The Court distinguished its Ingram and Davenport decisions by saying that those "cases involved a single act directed against a single interest, i.e., violent assault upon the person of another."[2/] The Court also noted the distinction between a crime against property, on the one hand, and a crime against the person, on the other, by saying "that Congress has differentiated between

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1/ Irby v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 19,988, dec. Nov. 17, 1967) (en banc), slip. op., pp. 2-3, n.2.

2/ Id.

housebreaking and robbery in terms of the one as an invasion of the security of the dwelling, and the other as an intrusion upon the security of the person."[3/] The Court then considered whether there was a sufficiently substantial doubt about what Congress intended as to cause the "rule of lenity"[4/] to operate in Irby and concluded that "the degree of doubt discernible on [the Irby] record does not warrant invocation of the rule of lenity."[5/]

In appellant's case, however, there is sufficiently substantial doubt about what Congress intended as to cause the "rule of lenity" to operate. Appellant was indicted for first degree murder and robbery, the first degree murder count of the indictment being founded on a "felony-murder" theory.[6/] On the second day of trial, appellant pleaded guilty to manslaughter under Count One of the indictment and to robbery under Count Two of the indictment. He was thereafter sentenced to from five to fifteen years on Count One of the indictment and from five to fifteen years on Count Two of the indictment, the sentences to run consecutively.

3/ Supra, note 1 at 3.

4/ Id.

5/ Supra, note 1 at 3.

6/ See R. Perkins, Criminal Law, p. 35, ch.2 § 1 (1957), where

An examination of the language and the history of the statutes involved in this case, Sections 2401, 2405 and 2901 of Title 22 of the D. C. Code, proves inconclusive in divining Congressional intent with respect to sentencing.[7/] Congress merely enacted these sections along with numerous others when it codified the law for the District of Columbia.

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the author says that under the "felony-murder rule":

> ...It is necessary to show that death ensued in consequence of the felony. It is not necessary, however, to show that the killing was intended or even that the act resulting in death was intended. It may have been quite unexpected. [Emphasis added.]

7/ Judge Leventhal, concurring in Irby en banc, pointed out the difficulty in divining Congressional intent in cases like appellant's when he wrote:

> ...Legislative intent is even less ascertainable when the Congressional enactment does not relate to a specific crime, or even reflect the narrowing to a sphere of delegated powers, but is part of a code embracing the entire span of criminal activity.... (Slip. op., p. 9)

II. WHERE THERE IS DOUBT AS TO WHETHER CONGRESS INTENDED THE IMPOSITION OF CONSECUTIVE SENTENCES, COURTS ADOPT A LENIENT CONSTRUCTION OF CONGRESSIONAL ENACTMENTS IN FAVOR OF SINGLE PUNISHMENT.

The Supreme Court, as well as this Court, in a significant number of cases [8/] have held that, barring a discernible Congressional intent to the contrary, courts will not impose consecutive sentences in the belief that it is "a pre-supposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." [9/]

8/ Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 2d 407 (1959); Ladner v. United States, 358 U.S. 169, 79 S. Ct., 209, 3 L.Ed. 2d 199 (1958); Prince v. United States, 352 U.S. 322, 77 S. Ct. 403, 1 L.Ed. 2d 370 (1957); Bell v. United States, 349 U.S. 81, 75 S. Ct. 620, 99 L.Ed. 905 (1955); United States v. Universal C.I.T. Credit Corporation, et al., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952); Irby v. United States, supra; Ingram v. United States, supra; Davenport v. United States, supra; Evans v. United States, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956).

9/ Bell v. United States, supra, at 83.

III. SINCE THERE IS SUBSTANTIAL DOUBT IN APPELLANT'S CASE AS TO WHETHER CONGRESS WOULD HAVE INTENDED THE IMPOSITION OF CONSECUTIVE SENTENCES, THE COURT SHOULD ADOPT THE "RULE OF LENITY," ESPECIALLY SINCE A "FELONY-MURDER" THEORY WAS THE BASIS FOR COUNT ONE OF THE INDICTMENT.

In light of the substantial doubt in appellant's case as to whether Congress would have intended the imposition of consecutive sentences, this Court should adopt the "rule of lenity" as it did under almost an identical factual situation in Davenport v. United States, supra. In that case the accused had been sentenced consecutively after pleading guilty to an aggravated assault and later to a manslaughter charge that had arisen from the same act.[10/] The Court per curiam reversed the District Court's denial of Davenport's motion to correct his sentence under Rule 35, Fed.R.Crim.P., saying:

> ...For the reasons already so well explored by Judge Fahy in his opinion for the court in Ingram, . . . we are constrained to hold that Congress did not intend to authorize consecutive punishments for aggravated assault and manslaughter in these circumstances . . . . (Davenport v. United States, supra at 883).

The Court should likewise rule in appellant's case that Congress did not intend to authorize consecutive punishments for robbery and manslaughter when both offenses arose from the same act.

10/ 353 F.2d at 883.

The "rule of lenity" should also be applied in appellant's case because unlike the indictment in the Irby case, the indictment here can be characterized as asserting that appellant's course of conduct was motivated by a single criminal intent.[11] On its face the indictment in appellant's case presumes a single criminal intent.[12] The "felony-murder" theory, upon which Count One of the indictment was founded, implies the transfer of the malice involved in the robbery to the accidental killing of Maceo C. Leatherwood, the victim of the robbery. There was no separate or additional proof of malicious intent required to charge the appellant with murder in the first degree under the circumstances of this case. As Count One of the indictment in appellant's case clearly indicates:

> Henry Patterson, . . . perpetrated a robbery . . . and in perpetrating that robbery, Henry Patterson, . . . unlawfully and feloniously did murder Maceo C. Leatherwood. . . .

In appellant's case the law implied that he intended the death of the robbery victim; whereas, in the Irby case, Irby had a choice of whether to commit a second offense "up to the moment of confrontation."[13] Appellant had no choice!

11/ Irby v. United States, supra, slip. op., p. 4, n.2.

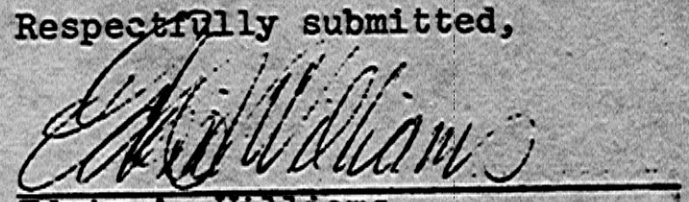
12/ See note 6, supra.

13/ Supra, note 11, p. 4.

CONCLUSION

For the foregoing reasons, the District Court's denial of appellant's motion for correction of his illegal sentence under Rule 35, Fed.R.Crim.P., should be reversed.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
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Cr. No. 1138-55

QUESTION PRESENTED

In the opinion of appellee, the following question is presented:

Whether District Court may impose consecutive sentences for the crimes of manslaughter and robbery where the convictions arise out of a single act or transaction.

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United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and four others were charged in a two-count indictment filed November 21, 1955, with first degre murder and robbery in violation of 22 D.C. Code §§ 2401, 2901. Count one charged that appellant and four others "perpetrated a robbery, by stealing, taking and carrying away, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, from the person and from the immediate actual possession of Maceo C. Leatherwood property of Maceo C. Leatherwood and Lorenzo Costa, Jr., of the value of

$16.12 . . . and in perpetrating that robbery, Henry Patterson [appellant], . . . [and four other named persons] unlawfully and feloniously did murder Maceo C. Leatherwood by means of striking and hitting him with their hands and fists thereby causing the said Maceo C. Leatherwood to fall to the pavement and to receive injuries of his head, of which injuries he did die . . . ."

Count two charged that appellant and four others "by force and violence against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Maceo C. Leatherwood property of Maceo C. Leatherwood and Lorenzo Costa, Jr., of the value of $16.12 . . . ."

On February 14, 1955, appellant withdrew his plea of not guilty which he previously entered and pleaded guilty to manslaughter under count one and robbery under count two. On March 9, 1956 he was sentenced by Judge Alexander Holtzoff to five (5) to fifteen (15) years on count one and five (5) to fifteen (15) years on count two, the sentences to run consecutively and to take effect at the expiration of the sentence appellant was then serving for another offense.

On April 4, 1967, appellant filed a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure alleging that the court improperly imposed consecutive sentences for the crimes of which he stood convicted. He relied on the opinion of the three-judge panel in *Irby* v. *United States*, D.C. Cir. No. 19,988, decided March 15, 1967.[1] On April 17, 1967, Judge Holtzoff denied appellant's motion and, referring to the opinion of the three-judge panel in *Irby*, noted:

> The *Irby* case is not applicable. In this case there were two separate and distinct crimes. In the *Irby* case the first crime merged into the second.

This appeal followed.

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[1] This opinion was subsequently vacated and the case was heard by the full Court. On November 17, 1967, the Court rendered its *en banc* decision.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in the perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2404, provides in pertinent part:

> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.

Title 22, District of Columbia Code, Section 2405, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatch-

ing, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

Appellant argues that the District Court improperly sentenced him to consecutive terms for the crimes of manslaughter and robbery since his convictions, according to the allegations in the indictment, were based on a single act or transaction. Indisputably, the statutes involved here—22 D.C. Code §§ 2405, 2901—define separate offenses. Appellant does not contend otherwise. Rather, he argues that congressional intent cannot be discerned to permit cumulation of the punishments for the crimes involved. There must, however, be some indicia of congressional intent not to cumulate punishment over and above the applicability of the statutes to the act. The statutes must either be part of the one general act designed to meet one evil or protect a particular interest (e.g. *Prince* v. *United States*, 352 U.S. 322 (1957)) or define "offenses on the same spectrum" (*Ingram* v. *United States*, 122 U.S. App. D.C. 334, 337, 353 F.2d 872, 875 (1965)). The statutes involved here essentially protect separate interests, although there may be some incidental overlap. Furthermore, the two offenses to which appellant pleaded guilty when arising from the same act constitute first degree murder, an act for which Congress has authorized punishment of either death or life imprisonment. 22 D.C. Code §§ 2401, 2404. Accordingly, we think the District Court could properly impose consecutive sentences for the crimes of manslaughter and robbery arising out of a single act or transaction.

ARGUMENT

The District Court may impose consecutive sentences for the crimes of manslaughter and robbery where the convictions are based on a single act or transaction.

Appellant argues that the District Court improperly sentenced him to consecutive terms for the crimes of manslaughter and robbery since his convictions, according to the allegations in the indictment, were based on a single act or transaction. In considering the propriety of imposing consecutive sentences as punishment for one criminal act or transaction which violates more than one statute, the Court in *Ingram* v. *United States*, 122 U.S. App. D.C. 334, 335, 353 F.2d 872, 873 (1965) declared:

> * * * the statutes are first examined to ascertain if they will bear interpretation as creating separate offenses.

And later, quoting from *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the Court set forth the rule for determining separate offenses:

> * * * where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

There is no doubt that the statutes involved here define separate offenses. *Cf. United States* v. *Bauer*, 198 F. Supp. 753 (D.D.C. 1961). Manslaughter is the unlawful killing of a human being without malice. *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 38, 207 F.2d 134, 138, *cert. denied*, 346 U.S. 885 (1953). It requires proof, *inter alia*, that the assailant inflicted an injury upon the deceased from which the deceased died, and that the homicide was committed without legal justification or excuse. See *e.g.*, *Bishop* v. *United States*, 71 App. D.C. 132, 107 F.2d 297 (1939); *Kinard* v. *United States*, 68 App. D.C. 250, 96 F.2d 522 (1938); *Allen* v. *United States*, 164 U.S. 492,

496-97 (1896). On the other hand, robbery requires proof that the assailant took property of some value from the victim against the victim's will by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting the victim in fear, and that the assailant took possession of the property from the person or immediate actual possession of the victim and, after having taken the property, carried it away without right to do so and with specific intent to steal it. See *e.g.*, *Jackson* v. *United States*, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965); *Byrd* v. *United States*, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965); *Turner* v. *United States*, 57 App. D.C. 39, 16 F.2d 535 (1926); *Spencer* v. *United States*, 73 App. D.C. 98, 116 F.2d 801 (1940); *Neufield* v. *United States*, 73 U.S. App. D.C. 174, 118 F.2d 375, *cert. denied*, 315 U.S. 798 (1941); *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961).

Appellant does not contend that the offenses for which he has received consecutive sentences are not legally distinct. Rather, he seeks to invoke the rule of lenity, asserting that no congressional intent can be discerned to permit cumulation of the punishments for the crimes involved. But as the Supreme Court noted in *Callahan* v. *United States*, 364 U.S. 587, 596 (1961):

> * * * [The rule of lenity], as is true of any guide to statutory construction, only serves as an aid for an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary. [Footnote omitted.]

To be sure, statutes may be unclear as to whether Congress intended to cumulate punishments for several offenses arising out of a singly inspired act or transaction, but it does not follow that statutes are unclear on the question of cumulative punishment simply because they apply to one act or transaction. See *e.g.*, *Gore* v. *United States*,

357 U.S. 386 (1958). Violations of different sections of one general act designed to meet one evil or protect a particular interest might give rise to an ambiguity on the question of cumulative punishments. Thus, in *Prince* v. *United States*, 352 U.S. 322 (1957) and *Heflin* v. *United States*, 358 U.S. 415 (1959), the Supreme Court invoked the rule of lenity in construing various subsidiary provisions of the Federal Bank Robbery Act, 18 U.S.C. § 2113, which punished entering a bank with intent to commit robbery, the robbery, and possession of property stolen in the robbery. The Court in *Prince* was careful to note that it was (352 U.S. at 325):

> dealing with a unique statute of limited purpose and an inconclusive legislative history. *It can and should be differentiated from similar problems in this general field raised under other statutes.* The question of interpretation is a narrow one, and our decision should be correspondingly narrow. [Emphasis added.]

Compare *Morgan* v. *Devine*, 237 U.S. 632 (1915) in which the Court upheld consecutive sentences for breaking into a post office and stealing government property therein. See also *Irby* v. *United States*, D.C. Cir. No. 19,988, decided November 17, 1967 (*en banc*).

In *Ingram* v. *United States*, 122 U.S. App. D.C. 334, 353 F.2d 872 (1965) this Court in denouncing the imposition of consecutive sentences for the crimes of assault with intent to kill and assault with a dangerous weapon based on one act—an assault with a knife—relied primarily on *Prince*. The Court noted that the statutes involved were two of four provisions in the District of Columbia Code defining four kinds of assaults with descending degrees of severity (see 22 D.C. Code §§ 501-504). The Court said (122 U.S. App. D.C. at 337, 353 F.2d at 875):

> This structure suggests that the offenses of assault with intent to kill and assault with a dangerous weapon are regarded as offenses on the same spectrum, the former being worse than the latter. The statute suggests a gradient of aggravated assaults.

And the Court went to note:

> Moreover, D.C. Code § 22-3202 provides that a person who commits a crime of violence when armed with a pistol or other firearm shall be punished by imprisonment up to five years "in addition" to the punishment for the other crime. If Congress had intended to punish an assault with intent to kill committed with a knife more severely than an assault with intent to kill but without such a weapon, it could have done so in similarly clear manner.

See also *Davenport* v. *United States*, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965) in which the Court held that consecutive sentences could not be imposed for the crimes of assault with a dangerous weapon and manslaughter where the convictions were based on one act.

Here, of course, there are none of the indicia which gave rise to the ambiguities in *Prince*, *Ingram* and *Davenport*. The statutes are neither part of the same general act nor define "offenses on the same spectrum." They protect separate interests. The manslaughter statute protects life, while the robbery statute protects property and the integrity of the person. To be sure, there may be some overlap between the two in that in protecting the integrity of the person the robbery statute protects life as well as limb. But the thrust of the two statutes is totally dissimilar. For example, the manslaughter statute requires the taking of human life, while the robbery statute may be satisfied even though the victim suffers no harm and indeed is unaware of the robbery. See *Spencer* v. *United States*, 73 App. D.C. 98, 116 F.2d 801 (1940); *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961). The robbery statute could, we think, be appropriately characterized as denouncing larceny from the person. See *Turner* v. *United States*, 57 App. D.C. 39, 40, 16 F.2d 535, 536 (1926); *Carey* v. *United States*, *supra*. In substance, it punishes a taking of property from the person. The manslaughter statute, on the other hand, is part of the homicide spectrum and has no relation to property or bodily harm short of death.

There is more to distinguish this case from *Prince*, *Ingram* and *Davenport*. Here the two offenses to which appellant pleaded guilty when arising from the same act constitute first degree murder—felony murder in violation of 22 D.C. Code § 2401. For this act Congress has authorized punishment of either death or life imprisonment. 22 D.C. Code § 2404. In *Ingram*, the Court observed (122 U.S. App. D.C. at 337, 353 F.2d 875):

> Congress has created no crime of assault with a deadly weapon with intent to kill. It would be pure speculation to conclude that Congress intended the punishment for a single assault to permit the consecutive sentences imposed in this case.

Here, of course, the matter is put to rest by 22 D.C. Code §§ 2401, 2404. Indeed, it seems to us if there is an ambiguity in the manslaughter and robbery statutes—and we do not think there is—it must be resolved against the background of the felony murder statute, 22 D.C. Code §§ 2401, 2404. If the question presented here is a matter of "generalized legislative intent," [2] it should be resolved to accomplish the result Congress manifested in authorizing punishment for the act as alleged in the indictment.

Appellant relies on this Court's decision in *Irby* v. *United States*, D.C. Cir. No. 19,988, decided November 17, 1967 (*en banc*) and argues that his criminal conduct was motivated by a single criminal intent and, unlike Irby, he had no opportunity to retract his course after completing one crime.[3] The Court in *Irby*, however, in upholding consecutive sentences for housebreaking and robbery, dealt with the problem of merger; that is, whether consecutive

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[2] *Irby* v. *United States*, D.C. Cir. 19,988, decided November 17, 1967 (concurring opinion of Judge Leventhal) (Slip. op. at 9).

[3] In *Irby*, *supra*, the majority, in upholding consecutive sentences for housebreaking and robbery, noted the different interests protected by the two statutes involved and found determinative the opportunity a housebreaker has to retract his steps before perpetrating the robbery, the crime which may have motivated the housebreaking.

sentences were proper where two or more offenses resulted from one continuous criminal transaction which may have been motivated by a single criminal purpose, and where the intent to commit one offense was an element of the other. This case does not, in our view, present the problem of merger. To contend that appellant had no opportunity to retract his steps after completing one offense but before embarking on the other does not aid the analysis. Because there is absent the problem of merger, the issue is not whether Congress intended to authorize separate punishments for different but related acts of one criminal transaction which may have been motivated by a single criminal purpose, but whether Congress intended to authorize separate punishments for the different interests invaded by one criminal transaction. In light of the punishment authorized for felony murder, the answer, we submit, is clearly yes.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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